The Impinge of the State of Emergency on the Fundamental Freedoms

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Note to the reader: The author is not a native speaker.

Abstract

This article is about the state of emergency in France, which will be in force until the 15th July 2017. After explaining the previous declaration of the state of emergency and its consequences, the article points out the conflict between the declaration of the state of emergency in France and fundamental freedoms as they are enshrined in French Law (law of 3rd April 1955 and law of 20th November 2015) as well as European (European Convention on Human Rights) and International (International Covenant on Civil and Political Rights) law and explains under which conditions the state of emergency can be lawful even if it implies a reduction or a derogation to fundamental freedoms which are supposed to be protected by the national and international pieces of legislation.

Keywords

France, State of emergency, Extension, Fundamental Freedoms, European Convention on Human Rights, International Covenant on Civil and Political Rights.

El Impacto de la Declaración del Estado de Emergencia en los Derechos Fundamentales de los Ciudadanos

Resumen

El presente artículo tiene por objetivo analizar a profundidad la declaratoria de estado de emergencia en Francia, que durará hasta el 15 de julio de 2017. Tras explicar las implicaciones y consecuencias del estado de emergencia, esta investigación pretende dilucidar el conflicto existente entre este y las libertades de los ciudadanos con el fin de evidenciar las contradicciones que supone este hecho. El documento tiene por base jurídica la legislación nacional francesa (ley del 3 de abril de 1955 y ley del 20 de noviembre de 2015), La Convención Europea de Derechos Humanos y el Pacto Internacional de Derechos Civiles y Políticos. Estos textos legales permiten comprender la legalidad de la declaración del estado de emergencia en un Estado determinado aunque esto implique una limitación a derechos fundamentales de los ciudadanos plasmados en normativa nacional tanto como internacional.

Palabras Clave
Francia, estado de emergencia, Derechos Fundamentales, Convención Europea de Derechos Humanos, Pacto Internacional de Derechos Civiles y Políticos.

1. Introduction

Two years ago, on January 7th, 2015 the satiric newspaper *Charlie Hebdo* was attacked by Al-Qaeda[1] and twelve people died. Two days later, a hostage taking took place in a kosher shop in Vincennes, Paris and four people died. Following these attacks, on November 13th, 2015, one hundred and thirty people died and hundreds were injured in the terrorist attack of the Bataclan, an auditorium in Paris. Simultaneously, in the *Stade de France,* three suicide bombers acted in front of the stadium without hurting anyone[2].

The terrorist attack of the Bataclan was the biggest one in France and was perpetrated by the Islamic State of Iraq and the Levant[3] (onwards "ISIL"). The President of the Republic, François Hollande, declared the state of emergency on the entire territory of France and the closing of the boundaries, in order to try to stop further terrorist attacks and prevent suspects from fleeing. It was the fourth time that the state of emergency was declared on the whole metropolitan territory of France.

The state of emergency is a situation of public emergency, which can be defined as a temporary system of rules to deal with an extremely dangerous or difficult situation[4]. It involves a derogation of usual human rights standards and a change in the distribution of constitutional powers[5].

2. Historic evolution

2.1. The state of emergency through 1955 - 2015

In order to understand the importance and the impact of this declaration, an analysis of the historical facts which led to the establishment of the regime of the state of emergency is necessary. On April 3rd, 1955, the Parliament voted the law creating the state of emergency and, thus, establishing a new state of extraordinary powers. The only existing one was the state of siege, which gave increased power to the army, by transferring the powers of the administrative police and judging civil cases to the military authority[6]. At that time, the government was trying to

1 An Islamist terrorist network created by Osama Ben Laden in the 1980's. Free translation. Encyclopédie Larousse. "Al-Qaida". n/d. http://www.larousse.fr/encyclopedie/divers/al-_Qaida/139920 (access: 20/04/2017).

2 De Mareschal, Edouard. "Terrorisme de 2012 à 2016, la Frrance durement éprouvée". *Le Figaro*. June 15, 2016. http://www.lefigaro.fr/actualite-france/2016/07/15/01016-20160715ARTFIG00002-terrorisme-de-2012-a-2016-la-france-durement-eprouvee.php (acess: 28/04/2017).

3 " […] Also known as Islamic State (IS) or Daesh, it is a salafist-jihadist organization in Iraq and Syria willing to impose and expend the caliphate […]". Standford University. *Mapping Militant Organizations: The Islamic* State. April 14, 2017. http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1 (acess: 20/04/2017).

4Cambridge Dictionary. "State of emergency". 2017. http://dictionary.cambridge.org/es/diccionario/ingles-chino-simplificado/state-of-emergency (access: 20/04/2017).

5 European Commission for democracy through law (Venice Commission). *Emergency Powers – Science and technique of democracy No.12*. No CDL-STD(1995)012-e, p. 3.

6 Free translation. Cossalter, Philippe. "Légalité de crise et état d'urgence". *Revue Générale du Droit*. November 15, 2015, paragraph 13.

avoid a *coup d'état*[7] perpetrated by the military unit in Algeria. Thus, they needed to increase the power of the government and not the army's, in order to facilitate the return to a usual state of affairs. Nevertheless, at that time, this new state of emergency was only declared on the Algerian territory.

The law of April 3rd, 1955 established the rules of the state of emergency. It gave the Parliament the power to vote for the declaration of a state of emergency and the faculty to determine its duration, according to articles 2 and 3. However, only if the conditions provided by article 1 were fulfilled, the vote could take place. That is to say that "if there is an imminent peril resulting from serious breaches of the public order or from events which, due to their nature and seriousness, have the character of public disaster"[8].

The first time the state of emergency was used in France was during the Algerian war[9], in May 1958. The law passed on May 17th 1958, which declared a state of emergency for three months[10]. It was declared because the French government was threatened by the possibility of a *coup d'état* in Algeria.

The second time, the President of the Republic, Charles de Gaulle, declared the state of emergency following the "Putsch of the Generals" in 1961, during the Algerian War. He also decided to use the extraordinary powers according to article 16 of the new Constitution of the 4th October 1958, which words as follows:

> If there is a serious and immediate threat over the institutions of the Republic, over the independence of the nation, over the fulfillment of its international commitments or over the integrity of the territory, and, if the proper functioning of the constitutional public authorities is interrupted, the President can take any necessary action after having consulted the Prime minister, the Presidents of the two assemblies and the Constitutional Council[11].

This state of emergency lasted for more than one year and caused a lot of disagreement and protests, because article 16 of the Constitution granted the President of the Republic exceptional powers. In fact, in 1961 the President continued to use the article 16, even if the conditions were not the same anymore. Moreover, it was not clear if all the conditions were fulfilled, because it was never proved that public powers were interrupted and that the threat over the institutions of the Republic was immediate[12].

The third one was following the riots of October and November 2005 in the Parisian's suburbs. After the Council of Ministers issued a decree[13], the President declared the state of emergency for

7 "Sudden defeat of a government through illegal force by a small group, often a military one." Cambridge dictionary. "Coup d'état". http://dictionary.cambridge.org/fr/dictionnaire/anglais/coup-d-etat?q=coup+d%27état (access: 22/05/2017).

8 Free translation. Law of 3 April, 1955, creating the state of emergency and applying it in Algeria. Republic of France Official Journal No 55-385, April 3, 1955. Article 1.

9 From 1954 to 1962, the war opposed France to Algerian separatists and took place during a decolonization process. The French government recognized its status of war only in 1999. Free translation. Encyclopédie Larousse. http://www.larousse.fr/encyclopedie/divers/guerre_d_Algérie/104808 (access: 20/04/2017).

10. Law n°58-487 of May 17, 1958. Declaration of the state of emergency on the metropolitan territory for three months. Republic of France Official Journal No. 58-487, May 17, 1958.

11 Free translation. Constitution. Article 16. October 4, 1958.

12 Free translation. Platon Sébastien. "Vider l'article 16 de son venin : les pleins pouvoirs sont-ils solubles dans l'état de droit contemporain ?". *Revue Française de Droit Constitutionnel*, HS n°2 (2008), pp. 97-116, paragraph 13.

13 Decree n°. 2005-1387 of November 8, 2005, relative to the application of Law n° 55-385 of April 3, 1955. Republic of France Official Journal No. 261, November 9, 2005.

two weeks on the entire territory. Nonetheless, it was effective only in twenty-five departments, where a threat to the public order existed[14]. After this period, the Parliament passed a law in order to extend the state of emergency for three more months[15]. Finally, after two months a decree was issued to put an end to the state of emergency[16], as the government judged that the circumstances had changed.

Since the beginning of 2015, 238 people have died in terrorist attacks in France[17]. Indeed, a major attack occurred in Nice, during the Bastille Day 2016, increasing the number of casualties of terrorism to eighty-four. This attack convinced the Parliament to vote, on July 21st 2016, to extend the state of emergency for six months, until the end of January 2017. Although President Hollande declared that he would not ask the extension of the state of emergency, he asked for it after the last attack.

2.2. Current situation

France was under the state of emergency since the attacks of 13th November 2015, as the Parliament extended it five times and it is supposed to end on July 15, 2017. However, a fifth extension seems unlikely, because on December 8th 2016, the *Conseil d'État,* the highest administrative authority, gave an unfavorable advisory opinion about it. The state of emergency was designed for short periods of time, in order to help the government have enough power to stabilize a temporary dangerous situation by increasing the power of the forces of order. As the *Conseil d'État* stated in its advisory opinion "the extension of the state of emergency cannot succeed each other indefinitely" and "it [the state of emergency] should remain temporary"[18]. The Government, nevertheless, did not take this opinion into consideration.

The state of emergency is a dangerous situation since it allows the executive bodies to have increased powers. The government, for instance, has the possibility to reduce some fundamental liberties protected by constitutional provisions and international legal instruments. In France, article 34 of the Constitution requieres that the law should also protect fundamental freedoms. The main objective of this article is to demonstrate that a state of emergency is not desirable for a long period of time, as it is in conflict with fundamental freedoms.

The Constitution and the international conventions, like the European Convention on Human Rights, set a possibility for the state to suspend the application of certain rights. However, it causes a problem with the normative hierarchy principle[19], because a law can prevent the application of Constitutional provisions and international conventions. In 1985 the Constitutional Council

14 *Id*. Article 1.

15 Law on the extension of the application of the law from April 3, 1955. Republic of France Official Journal n°. 2005-1425, November 18, 2005.

16 Decree N° 2005-1425 of November 18, putting an end to the application of the Law, 2005. Republic of France Official Journal No. 2006-2, January 13, 2006.

17 Les Décodeurs. "Le terrorisme islamiste a fait 238 morts en France depuis janvier 2015", *Le Monde*. July 26, 2016. http://www.lemonde.fr/les-decodeurs/article/2016/07/26/le-terrorisme-islamiste-a-fait-236-morts-en-france-en-18-mois_4975000_4355770.html (access: 26/7/2016).

18 Free translation. Conseil d'État, Advisory opinion. Registration number 392427, December 8, 2016, paragraph. 6.

19 Free translation. Cossalter, Philippe. "Légalité de crise et état d'urgence". Óp. cit., *p*aragraph. 21.

ruled that the law of 1955 was not contrary to the Constitution. The reason was that article 34 of the Constitution gave the competence to the legislator to enact the rule about fundamental freedom and oversee their balance with the public order.

Therefore in the worst case, the use of the state of emergency could lead to an authoritarian type of government. This would cause a change from a state governed by the rule of law, to a state where the government could suspend individual freedoms without any justification. Fortunately, some counter-powers have been anticipated in 1955 and by international bodies to prevent any abuse. In practice however, these are not really effective.

3. The consequences of the declaration of the state of emergency on fundamental freedoms

On the 14th of November 2015, after consulting the Council of Ministers[20], the President issued a decree declaring the state of emergency throughout the whole metropolitan territory of France[21]. This was the fourth time the state of emergency was declared.

The decree specified that the administrative authorities, the Ministry of Interior and the Prefect, were allowed to ask for searches, anywhere, including the homes, at any time of the day or night. The condition to do so, was prescribed in article 11 of the 1955 law, and consisted in the existence of serious reasons to think that the behavior of the person visiting the place subject to search could constitute a threat to the public security or the public order.

However, the places where professional activities of lawyer, judge and journalist are exercised or places used for the purposes of parliamentary mandates are excluded. These searches are administrative. The administrative authorities can ask for them without the authorization of a magistrate, the searches are not authorized by a judiciary body[22], and are governed by a special regime. The goal of these administrative searches is not to find proof to punish a culprit, it is rather seeks to prevent any public disorder and to gather information. This is a measure of administrative police, which aims to prevent and not to repress. Four days later, the President issued another decree declaring the state of emergency in Guadeloupe, Guyana, Martinique, Reunion, Mayotte, St Barthelme and St Martin[23].

On November 20th 2015, the Parliament voted for a law extending the state of emergency for three months starting on November 26, 2015[24], according to article 3 of the 1955 law. This law, relative to the state of emergency and its reinforcement and modernization modified the 1955 law in its articles: 6 on house arrest, 9 on the delivery of weapons, 10 about the power of the Government to order requisitions, 11 on searches, 13 about sanctions, and 14 about the control

20 Law of 3 April, 1955, creating the state of emergency and applying it in Algeria. Republic of France Official Journal No 55-385, April 3, 1955. Article 2.

21 Decree n°2015-1475 of November 14, 2015, on the application of the Law No. 55-385 of April 3, 1955. Official Register n° 0264, November 14, 2015.

22 Either a public prosecutor or an examining magistrate depending on the type of the case.

23 Decree n°2015-1493 of November 18, 2015, implementing overseas application of Law n°55-385 of April 3, 1955. Republic of France Official Journal No. 2015-1493, November 18, 2015.

24 Law No. 2015-1501, extending the application of the law n°55-385 of 3rd April 1955 and reinforcing the efficiency of its dispositions. Republic of France Official Journal No. 2015-1501, November 20, 2015.

of the administrative judge. This law of November 20th, 2015 included article 6-1, about the dissolution of association, which can now be ordered by a decree of the Council of Minister. It also added article 4-1, which gave the Parliament the right to be informed from every measure taken by the Government and the power to ask for additional information. Finally, it abrogated articles 7 and 12 of the law from 1955, which were not "corresponding anymore to the legal evolution of the society"25. The only dispositions the law of 2015 did not modify were articles 1 to 4 about the procedure to declare the state of emergency. Hereinafter the articles will be referred to as modified by the law of 2015[26].

In fact, once the state of emergency is declared, some dispositions of the law from April 3rd, 1955 are automatically applicable. Articles 5 to 9 are about the adoption of measures having a general effect or having an effect on certain individuals. For instance, article 5 of the law of 1955 states that on its territory, meaning the department, the Prefect can, by ordinance, ban the circulation of individuals or vehicles, on places and at hours decided by him. This article is a limitation to the right of movement (or access), an individual´s liberty, which has been declared as a constitutional principle in the decision of the Constitutional Council of July 12, 1979, and which is protected by articles 2 and 4 of the Declaration of Rights of Men and Citizens.

Furthermore, article 8 words that "the Prime Minister for the entire territory or the Prefect for his department, can order the closing of auditorium, bars or places of assembly whatever their nature, by ordinance"[27]. This is a limitation, or even a suspension to the freedom of association, the freedom of movement and the freedom of conducting business, as bars may be forced to close without gaining any profit. Unfortunately, in 1919 in the decision of Mrs. Dol and Laurent, the *Conseil d'État* authorized this administrative limitation to fundamental freedom, in exceptional circumstances such as war[28]. Therefore, the limitation of freedom by the Government in special circumstances has been accepted for a long time.

Moreover, article 6 lays down that the Ministry of the Interior is entitled to pronounce house arrest if there are serious grounds to consider that the person's behavior may constitute a threat for public security and order. Only suspicion is needed to pronounce house arrest on someone. There is no need to prove that the behavior or the activity could constitute a threat to the public order. Therefore, "the gathering of sufficient proof to limit a fundamental freedom is not required to use article 6 of the law from April 3rd, 1955"[29]. This article is a limitation to the freedom of movement, and also to the right to a private and family life, as it can disturb them. In addition, article 6-1 allows the dissolution of associations or gatherings, favoring actions breaching the public order, by a decree taken by the Council of Ministers. Contrary to all the

25 Free translation. Roudier Karine, Geslin Albane and Camous David-André. *L'état d'urgence*. Italy: Éditions Dalloz, 2016, p.51.
26 *Id*. pp.56-96.
27 Free translation. Law of 3 April, 1955, creating the state of emergency and applying it in Algeria. Republic of France Official Journal No 55-385, April 3, 1955. Article 8.
28 Conseil d'État of France. Decision Number 61593. February 28, 1919, paragraph 6.
29 Free translation. Roudier Karine, Geslin Albane and Camous David-André. *L'état d'urgence*. Italy: Éditions Dalloz, 2016, p. 61.

other measures, this one does not end once the state of emergency terminates. This exception is even more restrictive on the freedom of association, because when the conditions needed to declare the state of emergency are no longer present, the association cannot be created again. Moreover, the government increased its power by adding this article, because it has a lot of discretion, as the conditions of applications are very vague. Indeed, the government can prevent some undesirable demonstration on the grounds of a suspicion that would breach the public order, even if there would be no relation with any terrorist organization.

These four articles are the main interest when declaring the state of emergency. Thanks to their wide conditions of application, they increase the power of the executive bodies, which can easily lead to abuses. They enable the Government to increase its control over the population and therefore to reduce the risk of any breach in the public order and security. The real purpose of these preventive measures is to facilitate the collection of information and to avoid disturbances. It does not allow the judicial judge to pronounce a sentence, which would be the case under usual circumstances. Moreover, these articles reflect an acceptance of serious reductions of fundamental freedoms, which also creates a problem in respect to the hierarchy of norms.

Consequently, some decisions have been challenged before the Constitutional Council, which is the entity in charge of the control of constitutionality of every norm in the French legal system. Pursuant to article 61-1 of the 1958 Constitution[30], on December 22nd 2015, the Constitutional Council ruled on the constitutionality of the house arrest in the event of a state of emergency. It ruled that such a house arrest is not unconstitutional because it does "not cause a disproportionate violation to the freedom of movement"[31], on the grounds that:

> Considering in the first place that placement under house arrest can only be ordered if a state of emergency has been declared; […] that only a person resident in the area covered by the state of emergency in relation to whom "there are serious grounds to consider that his or her behavior may constitute a threat for public security and order" may be placed under house arrest;
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> Considering secondly that the order placing a person under house arrest, its duration, the conditions governing its application and the supplementary obligations with which it may be associated must be justified by and proportionate with the reasons that motivated the measure under the particular circumstances that led to the declaration of a state of emergency; that the administrative courts are charged with ensuring that such a measure is suitable, necessary and proportionate with the goal pursued [32].

According to the Constitutional Council, as long as the measures are proportional and necessary to protect the public order or security, fundamental freedoms can be limited during a state of emergency. If there is a claim before the administrative judge, he will assess the proportionality of the measure. When a measure of house arrest is evaluated, the judge of the emergency interim proceedings is competent to do so, because illegal limitation of freedom is an urgent matter. In

30 Introduced in 2008 in the Constitution, it gives the possibility for every individual part to legal proceedings, to ask the opinion of the Constitutional Council about the constitutionality of a disposition applied during these proceedings. The trial is then suspended until the Council gives its opinion. If it found for the unconstitutionality of the disposition, it cannot be applied in the proceedings anymore.

31 Constitutional Council. Decision Number 2015-527 of 22nd December 2015, paragraph 14.

32 *Id.*, paragraphs 11 and 12.

order to render a judgment, the judge will first assess if the subject of the house arrest is living in the territorial scope of the state of emergency. Secondly, the judge will determine if there are serious grounds to think that the behavior of that person can constitute a threat to the public order and security.

Third, the judge evaluates if the measure is proportionate to the reason of the declaration of the emergency state. This proportionality consists on a link, between the reasons of the declaration of the state of emergency and the ones leading to the house arrest, which according to the *Conseil d'État* and the Constitutional Council do not need to be direct. The judge will also assess if the measure is necessary, suitable and proportionate for the purpose pursued. For this appraisal, it is not clear which type of control the administrative judge should exercise. When using a restraint control, the judge will look for a manifest error only, if it is a wider one, he should look for any serious and illegal threat to a fundamental freedom resulting from the measure. It seems that the Constitutional Council tends to ask for a complete control from the judge of the emergency interim proceedings, who usually only have to do a restraint one.

Finally, the judge will verify that the duration of the house arrest is mentioned and also that it does not exceed twelve months. If not, it will automatically terminate simultaneously with the end of the state of emergency, but the judge considers that the measure will lack foreseeability, it would be declared as void. Moreover, every time the state of emergency is extended, the measures also need to be renewed expressly otherwise they are no longer legal[33].

Furthermore, if the decree declaring or the law extending the state of emergency applies article 11 from the law of 1955, the reduction of fundamental freedoms is even greater, because as aforementioned, executive bodies can authorize administrative searches. However, they must motivate the measure and the administrative judge is responsible of controlling it. This is not an absolute power granted to the Government. The law passed on November 20th 2015 specified article 11 is applicable.

Therefore, the constitutionality of the modified article 11 has been challenged. The Constitutional Council ruled that it was complying with the Constitution. On February 19th, 2016, this decision was also brought before the Council on the basis of article 61-1 of the Constitution. The plaintiff argued that article 11 of the law on the state of emergency was violating the right to private life, effective judicial relief and individual liberties[34]. Nevertheless, according to the decision, the extraordinary measures provided by this article are proportionate and necessary in order to preserve the nation from an imminent peril or a public calamity.

In addition, a consensus has to be found between two constitutional principles, the protection of fundamental freedoms and the preservation of the public order and security[35]. Similarly to the first case mentioned, the Constitutional Council is assessing if the measures are suitable and

33 Degirmenci Selim. "Une validation sinueuse de l'assignation à résidence en état d'urgence doublée d'un appel renforcé au contrôle du juge administratif". *La revue des droits de l'Homme* (online review), 1763 (2015), pp. 8-14.
34 Constitutional Council of France. Decision Number 2016-536, 19th February 2016, paragraph 2.
35 *Id.*, paragraph 12.

proportionate for the protection of the public order. The Council plays a role of conciliator between national security and individual freedoms. It seems to argue in favor of the public security or order in the majority of the cases, meaning that the fundamental liberties are not an absolute priority.

However, in the above-mentioned decision the Council also ruled that the second sentencce of the third subparagraph of paragraph I of article 11 was unconstitutional[36]. The Council words the grounds as follows:

> Considering that the provisions of the second phrase of the third subparagraph of paragraph I of Article 11 of the Law of 3 April 1955 enable the administrative authority to copy all computer data that it may have the possibility to access during the course of the search; that this measure is equivalent to a seizure; that neither this seizure nor the exploitation of the data thereby collected has been authorized by a court, even if the occupant of the location searched or the owner of the data objects and even though no offence has been established; that in addition data may be copied that has no link with the person whose conduct constitutes a threat for security and public order and who has frequented the location at which the search has been ordered; that in doing so, the legislator did not put in place legal guarantees capable of ensuring a reasonable balance between the objective of constitutional standing of safeguarding public order and the right to respect for private life; […] the provisions of the second phrase of the third subparagraph of paragraph I of Article 11 of the Law of 3 April 1955, which violate Article 2 of the 1789 Declaration, must be declared unconstitutional[37].

Thus, this part of article 11 has been abrogated and is not applicable any more, as in addition to causing an interference with the private life of an individual suspected by the administration, it can also interfere with the private life of a third person. Before the sentence was abrogated and the state of emergency declared, approximately three months passed, where a lot of searches were ordered. In fact, from the beginning of the state of emergency to February 3th 2016, there were 3299 administrative searches and 392 persons were placed under house arrest[38]. Some of these searches applied the unconstitutional part of article 11 of the law of 1955. For instance, as a result of a search made on November 18th, 2015 even some Facebook conversations were copied[39]. They exposed some relation with Islamic religion and other reasons, which led to the declaration of a house arrest, which was suspended by the administrative tribunal of Lille in December 2015 based on a serious and clearly illegal limitation of the right of movement of the plaintiff[40].

There is an evident conflict between the measures authorized under the state of emergency and the fundamental freedoms. More precisely, former article 11 of the law from 1955 is contrary to article 2 of the Declaration of Rights of Men and Citizen from 1789, on the right to a private life and the right to the inviolability of the domicile. This conflict has been recognized by the Constitutional Council. But according to its decision from September 23rd 2016, the action of a penal procedure consequent to a measure taken on the basis of the unconstitutional

36 *Id.*, paragraph 14.
37*Id.*, paragraph 14.
38 Senate, Mercier Michel. Report n°368 (2015-2016). Preliminary document.
39 Administrative Tribunal of Lille. *Case N°1510268*. Order of 22 December 2015, paragraph 7.
40 Administrative Tribunal of Lille. *Case N°1510268*. Order of 22 December 2015, paragraph 14.

part of article 11 cannot be questioned. The Council found that it would be contrary to the constitutional principle of the safeguard of the public order and would have excessive consequences[41]. This means that some people suffered unlawful searches and pursuant to that have been punished, but they cannot claim the unconstitutionality of the basis given to their sentence. One could argue that this is a violation of the principle of the legality of the sentence, which is linked to the right of a fair trial, another fundamental right, or to the principle of the rule of law.

On the one hand, some unconstitutional dispositions have been applied and the Constitutional Council recognized it, eliminating this unconstitutional part. Also, the same Council ruled that it would be contrary to the protection of the public order to stop the penal procedures generated by this unconstitutional article or to amnesty them. This is worrying because it means the application of a law declared contrary to the highest norm of the well-known Kelsen model could even initiate penal procedures. It is then a sort of denial, from the Council, of the unconstitutionality of the abovementioned part of article 11. But this reasoning seems logical regarding the configuration of the Council. In fact, the Constitutional Council members are law practitioners of exceptional reputation, former ministers and also former Presidents, who automatically become members after the end of their mandate[42]. Even though the Council is supposed to be independent and impartial, while some members are former political figures, they will obviously support the increase of power of the Government and not the protection of fundamental freedoms.

This situation of reduction of fundamental liberties continued as the law passed on February 19th 2016 extended the state of emergency for three more months[43]. Following the law about the first extension, this one also specifies that article 11 is applicable. Once more, on May 20th 2016, the Parliament adopted a law extending the state of emergency because of the international events of June and July[44], but the justification was not an intense threat of attacks. This time, article 11 of the 1955 law was not applicable. No search could be conducted apart from the regular judicial procedure. Plus this extension was only for two months, ending on July 26th. This could have been interpreted as the last extension and as a soft return to the regular situation[45].

Finally, on July 19th, the Government decided to extend the state of emergency for the fourth time. The law, adopted by the Parliament, authorized searches and specified that if the search revealed the existence of electronic documents, these could be seized. These objects must have a connection with the threat to the public order and security caused by the behavior of the

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41 Constitutional Council of France. Decision Number 2016-567/568. QPC of 23rd September 2016, paragraph 11.
42Constitution of the Republic of France. Article 56. October 4th 1958.
43 Law n° 2016-162 of February 19, 2016. Extending the application of the law n°55-385 of April 3, 1955 about the state of emergency. Republic of France Official Journal No.2016-162, February 19, 2016.
44 When the European Championship of Football, Euro2016 and the Tour de France took place.
45 The Editorial Board. "France's Permanent Emergency State". *The New-York Times* (online). 25th July 2016, The Opinion Pages.

individual. The seizure can be made either by copying the content or by confiscation of the support if a copy cannot be made during the time of the search. This must occur with the presence of a judicial police officer and a judge of emergency interim proceedings, who must authorize the exploitation of the seized data. This measure is clearly replacing the one declared unconstitutional by the Constitutional Council on February 19th 2016. It is specified that this copy can only be done after the confiscation is declared, so there is no infringement to the right of property and it must be referred to the public prosecutor, so the procedure is controlled. Therefore, this article is not likely to be judged unconstitutional as no violation of fundamental right can arise from its application on a legal stand point.

The state of emergency was extended for six additional months and supposed to be considered the last extension. Despite this, on December 19th, the Parliament voted, for the fifth time, for the extension of the state of emergency until July 15th 2017. In this case, the justification was based on the presidential election that was going to take place. Indeed, a lot of political meetings and gatherings took place and could be target of terrorist attacks. As a result, France was under the state of emergency for more than one year and a half.

As stated previously, the state of emergency is giving rise to controversial limitations of fundamental freedoms and increased powers of the Government. Although this law of 1955 is very criticized and dangerous, in most of the cases it has been judged in conformity with the Constitution. Therefore, two questions should be raised. First, is the reduction of fundamental freedoms legal when the measure is enforced for a long period? Unfortunately, no national provisions have regulated the length of the state of emergency and no decision of the *Conseil d'État* or the Constitutional Council have declared an extension unconstitutional. Second, is this reduction of fundamental freedom acceptable under international law and is there a limit to the period of time the state of emergency can be declared?

4. The derogation of international commitments under human rights instruments in case of a state of emergency

As mentioned in the introduction, France is part of the European Convention on Human Rights (onwards "ECHR") and therefore must comply with it. It is also member of the International Organization the United Nation (onwards "UN"). France ratified the United Nations' Charter in 1945, and consequently, has to obey the rules of the UN as well.

The conflict with international laws is really tangible, as on the pyramid of legal norms, the international conventions are above national Constitutions. Therefore every norm of a national legal system must be in accordance with international dispositions. In France, national legal practitioners tend to think that the Constitution remains as the supreme norm. According to them in order for an international piece of legislation to be lawful it has to comply with the Constitution. However, it is the Constitution, which should be amended, if not in line with international dispositions, not the other way around.

Therefore, when France declares a state of emergency, it must comply with international norms. The ECHR and the International Covenant on Civil and Political Rights (onwards "ICCPR"), adopted by a General Assembly's Resolution of the UN in 1966 and entered into force in 1976, were anticipating this situation. These texts protect fundamental freedoms, which France agreed to respect and protect in ratifying them respectively in 1974 and 1981.
However, article 15 of the ECHR provides the possibility to derogate obligations under certain circumstances. Indeed, article 15 states the following:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

According to the ECHR, it is legal to reduce some fundamental freedoms but not to violate the right to life, the prohibition of torture, of slavery and forced labor and the principle of no punishment without law, which are non-limitable rights. The judges of the European Court of Human Rights (onwards "ECtHR") are entitled to assess the proportionality between the derogative measure taken by the state and the reasons why the state of emergency has been declared. Moreover, all the national possibilities of review have to be used before a case is brought to the ECtHR.
This article also declares that the State parties of the Convention should inform the Secretary General of the Council of Europe. This procedure of information is a way for the Council to monitor the measures taken by the State having declared an emergency. France decided to make use of article 15 of the ECHR and consequently informed the Council of Europe by letters on November 24th 2015, February 25th 2016, May 25th 2016, July 22nd 2016 and December 21st 2016.
The first question regarding these letters is, under article 15 of the ECHR, can a terrorist attack be considered as a public emergency threatening the life of the nation?
The declaration of the state of emergency has to be regarded as complying with article 15 of the ECHR according to the reservation contained in the instrument of ratification, deposited on May 3rd, 1974 by France. It lays down the conditions to apply article 16 of the Constitution from 1958, or to declare the state of siege or of emergency has to be understood as complying with paragraph 1 of article 15 of the Convention. This means a terrorist attack can be considered as a public emergency threatening the life of the nation. Plus, in the case of the ECHR *A. and others v. United Kingdom* of February 19th 2009, the Court ruled that conditions of article 15 must be interpreted as a situation of crisis or of exceptional danger, affecting the entire

population, and constituting a threat for the organized life of the community composing the State[46]. It also agrees on the fact that a threat of terrorist attack justifies the application of article 15.

In this case, the ECHR also had to assess the proportionality of the imprisonment for a non-determined period. The Court ruled that this measure was not justified because it made a difference between the United Kingdom's citizens and foreigners. It is important to notice that even if some fundamental freedoms can be limited, this limitation must be applied equally to everyone. If performed in a discriminatory way, measures are forbidden. Consequently, the ECHR seems to allow the limitation of some fundamental freedom in case of emergency only if the measure aims to facilitate the return to a normal situation. Measures having a discriminatory effect cannot be accepted, as discrimination is prohibited under regular circumstances. If measures are discriminatory the aim cannot be to facilitate the return to the usual situation, as it is in breach with rules under usual circumstances.

Thus, declaring the state of emergency and derogating some fundamental freedoms is legal if it complies with article 15 of the Convention and measures taken are proportionate to the threat and are not discriminatory. But in its letter of information, France specifies "The terrorist threat in France is of a lasting nature, having regard to information from the intelligence services and to the international context"[47].

The second question is, can the state of emergency be lawful if declared for a long period of time? The ECtHR is not in favor of controlling the duration of a state of emergency, so it ruled in the case abovementioned that:

> 178. While the United Nations Human Rights Committee has observed that measures derogating from the provisions of the International Covenant on Civil and Political Rights must be of "an exceptional and temporary nature" (see paragraph 110 above), the Court's case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years […][48].

Therefore, States can use article 15 of the ECHR for several years if the circumstances require it. The declaration of the state of emergency is legal even if the threat of a terrorist attack is not considered as of a "temporary nature", given all the attacks perpetrated in France since November 2015. Thus the state of emergency that has lasted for more than a year and a half in France is legal.

However, the role of this Convention is to protect fundamental rights, so a limitation to this protection can be accepted only for extraordinary situations and for a short period of time. Otherwise, there is no point of having an international legislation aiming to protect fundamental

46 European Court of Human Rights. *A. and others v. UK*. Application No. 3455/05, February 19th, 2009, paragraph 176.
47 Declaration contained in a verbal note from the Permanent Representation of France in the Council of Europe, dated 24 November 2015, registered at the Secretariat General on 24 November 2015.
48 European Court of Human Rights. *A. and others v. UK*. Application No. 3455/05, February 19th, 2009, paragraph 178.

rights. In fact, if limitations to these rights can be imposed for a non-limited period of time by states having ratified the Convention, meaning that they have agreed to comply with the international obligations of the Convention, these obligations to protect fundamental rights are senseless, since derogation of them can be done in total compliance with the same Convention. The UN Human Rights Committee has considered the terms of the limitation of fundamental rights in another way. In fact, in its General Comment No.29: Article 4, derogation during a state of emergency, it stated "Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature"[49] as mentioned by the ECtHR. Although it can only be temporary, reducing fundamental freedoms because of a state of emergency is allowed under international law. Indeed, the ICCPR states in its article 4 that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin […] [50].

France made the same reservation, when ratifying the ICCPR and the ECHR. This means article 4 can be used if the state of emergency is declared in compliance with the French law. However, according to paragraph 2 of the article "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision"[51]. Therefore no State can derogate to the list of rights settled in article 15, paragraph 2 of the ECHR and to the right of no imprisonment if a contractual obligation is not fulfilled, the right to recognition before the law as a person and freedom of thoughts, religion and conscience. This list of non-limitable rights is wider than the one provided with the ECHR. Therefore, the ICCPR is more protective in regards of human rights in comparison to the ECHR. Furthermore, another proof of the wider protection of the ICCPR can be found in the General Comment No. 29. The Committee decided that:

> However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence[52].

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49 United Nations Human Rights Committee, *Derogations during a State of Emergency CCPR/C/21/Rev.1/Add.11*. General Comment No.29, article 4, August 31st, 2001, paragraph 2.

50 International Covenant on Civil and Political Rights. Article 4, paragraph 1. General Assembly Resolution 220A (XXI) of 16th December 1966.

51 International Covenant on Civil and Political Rights. Article 4, paragraph 2. General Assembly Resolution 220A (XXI) of 16th December 1966.

52 United Nations Human Rights Committee, *Derogations during a State of Emergency CCPR/C/21/Rev.1/Add.11*. General Comment No.29, article 4, August 31st, 2001, paragraph 11.

Thus, the ICCPR does not allow any derogation of fundamental principles of international law or humanitarian law. The State also has to inform if it puts an end to the state of emergency. France informed the Secretary General of the declaration of the state of emergency by letter on November 23rd 2015. This letter also declared that some of the measures taken could imply some derogations of fundamental freedoms protected in the ICCPR[53]. These measures must be referred to the Secretary General so the UN Human Rights Committee can control them, but it is not the only body able to do so, as the General Comment No.29 writes:

> Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant[54].

Therefore, the Committee and the other State parties of the Convention can exercise a mission to control the measures taken by the state having declare the state of emergency. It is specified in the General Comment No.29 that:

> […] it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40, sufficient and precise information about their law and practice in the field of emergency powers[55].

This means a State declaring a state of emergency should explain the national legislation applicable to this situation and its use, in its report. The UN Human Rights Committee and other States are exercising this control through periodic reports, however these are not legally binding for the States[56]. Thanks to these reports, the Committee noticed that legislation of some countries (the UK, Tanzania, Peru for instance) were not respecting the Covenant because it authorized derogations of fundamental rights in situations not covered by article 4[57].

There is another control that can be exercise by the Human Rights Council, if an individual, a group of people, or a non-governmental organization petition the Council based on a human rights violation. Nevertheless, it is only possible in cases of evident and systematic violation of human rights and if every internal recourse has already been used, which implies that several years have passed. This control is not really effective because justice will be administrated years after the violation of rights occurred and there are effective harmed individuals. Moreover, until today, no decision of the Human Rights Committee has said that the declaration of emergency by Francois Hollande was not legal. Following this logic, France can continue to derogate to fundamental freedoms, however it must be within the limits imposed by the ICCPR.

53 International Covenant on Civil and Political Rights. *France: Notification under article 4 (3) C.N.703.2015.TREATIES-IV.4*. Notification, 23 November 2015, last paragraph.

54 United Nations Human Rights Committee. *Derogations during a State of Emergency CCPR/C/21/Rev.1/Add.11*. General Comment No.29 of article 4, 31st August 2001, paragraph 17.

55 United Nations Human Rights Committee. *Derogations during a State of Emergency CCPR/C/21/Rev.1/Add.11*. General Comment No.29 of article 4, 31st August 2001, paragraph 2.

56 Roudier, Karine; Geslin, Albane and Camous, David-André. *L'état d'urgence*. Italy: Éditions Dalloz, 2016, p. 124.

57 Steiner, Henry J.; Alston, Philip and Goodman, Ryan. *International Human Rights in Context: Law, Politics, Moral*. 3rd ed. Oxford: Oxford University Press, 2008, p. 389.

Finally, the derogation to international human rights can be justified under international law if the State declares a state of emergency. Unfortunately, the means of controlling the measures taken by the State are not really efficient and usually are not fast enough to prevent human rights' violations. Therefore, some abuse of rights could arise from the declaration of the state of emergency in total impunity under international law.

5. Conclusion

To conclude, even when fighting against terrorism, some exceptional measures must be taken because the ones provided by the 1955 law are not appropriate. In fact, from the beginning of the state of emergency until May 2016, 3579 administrative searches have been ordered, but most of them did not lead to the opening of an antiterrorist procedure. However, they seem to be useful to gather more information and to remove any doubts of terrorist activities[58]. According to the Minister of the Interior, these measures also allow the authority to uninstall the network around terrorist actions[59]. Furthermore, according to the Resolution 1373, from the UN Security Council, of 2001, States should change their legislation in order to fight terrorism by criminalizing terrorist actions and prohibiting every act supporting terrorists, as for example the supply of weapons[60]. Therefore these searches are in line with the Security Council's resolution.

Although France followed this UN Resolution, the conditions required to declare the state of emergency are not precise. Actually, in the public declaration about the law on the state of emergency and the law on the electronic international communications, made by some experts of the UN, in Geneva, on January 19th 2016, this lack of precision is questioned[61]. More precisely, this declaration is about the definition of "serious grounds" and what constitutes a threat to the security and the public order in the law of 1955 about house arrests and searches. The experts regret the lack of accuracy and of definition of these terms "allowing to put under house arrest a lot of people, beyond an application strictly related to the fight against terrorism"[62]. It also called the French government to not extend the state of emergency after February 2016, but, obviously, France did not follow this opinion, as the Parliament extended it in February 2016.

Despite the fact it is the Parliament that votes for the extension of the state of emergency, the Government has a strong influence. Every time, it was a *projet de loi* and not a *proposition de loi* of which the Parliament is the initiating body. As the Government's political party has the majority in the Parliament, it was easy to adopt these extensions, even for the fifth time. More

58 Roudier, Karine; Geslin, Albane and Camous, David-André. *L'état d'urgence*. Italy: Éditions Dalloz, 2016, pp. 83-84.

59Senate, Mercier Michel. Report n°368 (2015-2016). Preliminary document. http://www.senat.fr/rap/l15-368/l15-368.html (access: 17/02/2017).

60 United Nations Security Council. *Resolution No. 1373*. Adopted by the Security Council at its 4385th meeting, 28 December 2001, section 2 (e).

61 United Nations Human Rights Council. Report of the Special Procedure, Public declaration about the law on the state of emergency and the law on the surveillance of international electronic communications. http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16961&LangID=F

62 Free translation. *Id*., paragraph 4.

precisely, the first extension was adopted with 551 votes in favor, six against and one abstention in the National Assembly, and 336 in favor and twelve abstentions for the Senate. Another reason why the Parliament voted so easily for the extensions is probably the article 4-1 of the law of 1955. It lays down that every action taken by the Government should immediately be reported to the Parliament, whose functioning is not affected by the declaration of the state of emergency. The Parliament can act as a counter-power to the executive body and therefore control the power grant to the Government during state of emergency.

Furthermore, the *Défenseur des Droits* (Defender of Rights) is also a counter-power to the executive's actions under the state of emergency. In fact, this constitutional body created in 2011, is in charge of controlling the respect of the rights and freedoms by the State's administrations or every public institution. Every individual who has an interest can refer a case to the *Défenseur des Droits*. From the adoption of the law of November 2015, this body collected all the cases due to the declaration of the state of emergency. On February 23rd 2016, seventy-three cases had been reported. Fifty-three of them were about house arrest and search without judicial consequences. The others were indirectly linked to the state of emergency. They were about, for instance, an unfair dismissal, because the employee had a beard and the prohibition to access to public places for women wearing a veil[63].

Moreover, contrary to the state of siege[64] or of extraordinary power of the President[65], the state of emergency is a civil regime of extraordinary circumstances, not a constitutional one. This means that no constitutional basis is protecting the application of the state of emergency, but a law regulates it. Thus, a control of constitutionality can be asked *a priori* according to articles 61 (2), which words "[…] laws can be bring before the Constitutional Council, before their enactment, by the President of the Republic, the Prime Minister, the President of the National Assembly, the one of the Senate or sixty deputies or senators"[66]. Or it can be ask to the Council *a posteriori* (after the law is enacted) according to article 61-1 of the Constitution. As mentioned before, some measures adopted in accordance with the law of 1955 have been challenged. Unfortunately when the law was voted by the Parliament in 2015 no *a priori* control has been asked[67] because the *Conseil d'État* already ruled about the constitutionality of the law from 1955[68]. In a decision of 2005, it approved the constitutionality of the text, as well as the Constitutional Council did in its decision concerning the declaration of the emergency state in New Caledonia[69]. It ruled that the new Constitution of 1958 did not abrogate the law on the state of emergency from 1955.

63 Roudier Karine, Geslin Albane and Camous David-André. *L'état d'urgence*. Italy: Éditions Dalloz, 2016, p. 138.
64 Constitution of the Republic of France. Article 36. October 4th 1958.
65 Constitution of the Republic of France. Article 16. October 4th 1958.
66 Free translation. Constitution of the Republic of France. Article 61 (2). October 4th 1958.
67 Boucopza, Isabelle and Girard, Charlotte. "« Constitutionnaliser » l'état d'urgence ou comment soigner l'obsession d'inconstitutionnalité ?". *La revue des droits de l'Homme* 1784 (2016), p. 5, paragraph 14. https://revdh.revues.org/1784 (access:15/02/2017).
68 Conseil d'État. *Decision No. 287217*, 21 November 2005, paragraph 6.
69 Constitutional Council of France. *Decision Number 85-187*, 25 January 1985, paragraph 4.

Nonetheless, the Government, in line with its project of modernization of the state of emergency, initiated by the amendment of the 1955 law by the one of 2015, wants to make the emergency state part of the Constitution in a new article 36-1[70]. Indeed, President François Hollande, himself, said he wanted this regime in the Constitution. The main reason for this interest is to avoid any preventive annulment of a law declaring the state of emergency on the grounds of its unconstitutionality.

Another reason for this project is to avoid the control of the judiciary judges who are in charge of defending the fundamental liberties and who are likely to annul some measures taken in accordance with the law of 1955. As amend the Constitution is really hard and as the law of 1955 already has been declared constitutional, this "constitutionalization" of the state of emergency is unlikely to happen. In addition, this would only solve the problem related to the hierarchy of norms, not the one related to the limitation of the fundamental freedoms. One of the most important features of the Constitution is to protect the individual liberties, however, if the state of emergency is constitutionalized there would be a conflict between the content of the Constitution and its objectives. For this reason, it is not a valid solution.

Therefore, even if some counter-powers and means of control are in place, it is not enough to ensure that no fundamental freedom will be violated, or at least, that the derogation is proportionate. The state of emergency is a dangerous extraordinary situation, which can easily lead to abuses. Consequently, it is not desirable that a government can legally declare a state of emergency for more than one year and a half. Unfortunately, this is what is happening now in France.

In addition, this situation of reduction of fundamental freedoms under the state of emergency is not satisfying at all. Indeed, it has been created in order to help the government to face a threatening situation for the nation. Nowadays, this situation is a terrorist threat. The Government is willing to take every action to fight against this, because terrorism is acting against the values of western nations. These values are, precisely, the fundamental freedoms and their reduction or abolition is what France and every western society are trying to fight against. Thus, reductions of fundamental freedoms resulting from this fight are not acceptable. Despite the fact that the state of emergency can be considered as a solution to restore the public order and security right after a terrorist attack, for instance, it cannot be a lasting solution. Consequently, the regime instituted by the law of 1955 is not a solution to fight against terrorism. Neighboring countries from Western Europe understood this argument better than France, as none of them having suffered terrorist attacks (Belgium, Germany, the United Kingdom for example) have declared a state of emergency.

Nevertheless, it is desirable that in a few months, one of the international institutions mentioned above in the article, will declare this last extension as not proportionate. Thus it will not be

70 Conseil d'État. *Advisory opinion on the constitutional bill for the protection of the Nation*. General Assembly of 11 December 2015, paragraph 2.

acceptable anymore under international law and France would have to declare the end of the state of emergency. Another solution would be that the Government finds an alternative and suitable remedy to fight against terrorism.